

# State of Colorado



**Bill Owens**  
*Governor*

**John Zakhem**  
*Board Chair*

**Kristin F. Rozansky**  
*Board Director*

**State Personnel Board**  
633 17<sup>th</sup> Street, Suite 1320  
Denver, Colorado 80202-3604  
Phone (303) 866-3300  
Fax (303) 866-5038

## Meeting Minutes September 20, 2005

The State Personnel Board met in public session on Tuesday, September 20, 2005, at the Department of Corrections, Buena Vista Correctional Center (BVCC), 15125 Highway 24 & 285, P.O. Box 2017, Buena Vista, Colorado 81211.

The meeting was called to order at approximately 9:00 a.m. Board members John Zakhem, Diedra Garcia, Troy Eid, and Donald J. Mares were present in person. Elizabeth Salkind was present via teleconferencing.

Kristin F. Rozansky, Board Director, was present in person. Assistant Attorney General Pam Sanchez, Board Counsel, and Jane Sprague, General Professional III, were present via teleconferencing from the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

### **I. REQUESTS FOR RESIDENCY WAIVERS**

#### **A. September 1, 2005 Report on Residency Waivers**

Director Rozansky reported that she granted one residency waiver request for one year to the Department of Public Safety for the position of Patrol Intern. One reason for the request was so that the agency would be able to recruit from military personnel who reside outside of the state. In addition, the Department of Human Services reported to the Board that a nursing home administrator was hired in January by the department following a residency waiver request made by the agency. The person hired for the position was an in-state resident.

### **II. PENDING MATTERS**

#### **A. Petition for Declaratory Order of Valerie Frens v. Colorado Department of Corrections and Robert Flores, State Personnel Board case number 2006D001.**

On September 13, 2005, Complainant filed Complainant's Notice of Settlement and Unopposed Motion to Stay Proceedings, which was granted by order of the Administrative Law Judge on September 16, 2005. Therefore, this matter was withdrawn from consideration by the Board at its meeting.

- B. Lanphier v. Department of Public Health and Environment, Radiation Services, State Personnel Board case number 2003B0017.

Director Rozansky recused herself from participation in the discussion of this case and left the meeting room. Board Counsel Sanchez directed the discussion, advising the Board concerning jurisdiction and statutory deadlines, and Ms. Sprague called the vote. It was determined that Complainant's Notice of Appeal of the Initial Decision of the Administrative Law Judge and Complainant's Motion for One-Day Extension of Time to File Notice of Appeal were untimely. Mr. Mares moved to grant Respondent's Motion to Dismiss, dismissing Complainant's appeal of the Initial Decision of the Administrative Law Judge. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

### **III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD**

- A. Freddie L. Montoya v. Colorado State University at Pueblo, State Personnel Board case number 2005B059.

Following a discussion of the statutory definition of record, Mr. Eid moved to grant Respondent's Motion to Strike Complainant's Exhibit A to Complainant's Appeal Brief and any reference thereto on the grounds that Exhibit A was not in evidence during the evidentiary proceedings in front of the Administrative Law Judge. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

Mr. Eid then moved to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

### **IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING**

- A. Brenda Johnson v. Department of Human Services, State Personnel Board case number 2005G053.

Ms. Garcia moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem. In addition, Director Rozansky provided some procedural background about the Board's discretionary hearing process.

**V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR**

- A. Foggia Fognani v. Department of Corrections, Trinidad Correctional Facility, State Personnel Board case number 2005B043 (September 8, 2005).

Complainant, a teacher, appealed his disciplinary termination, seeking rescission of the termination, reinstatement to a similar position in a different facility, back pay and benefits, and an award of attorney fees and costs. After hearing, the ALJ found that Complainant committed the acts upon which discipline was based, including failing to report an inmate's physical and sexual threats against Complainant; violating the contraband regulation by bringing baked goods in for the inmate; and engaging in sexual innuendo, but not sexual contact, with the inmate. Affirming Respondent's termination, the ALJ also concluded that Respondent's action was not arbitrary, capricious, or contrary to rule or law; Respondent did not retaliate against Complainant for exercising his rights under FMLA; and Complainant is not entitled to an award of attorney fees and costs.

**VI. REVIEW OF THE MINUTES FROM THE AUGUST 16, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD**

Ms. Garcia moved to approve the minutes of the August 16, 2005 meeting as submitted. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

**VII. ACKNOWLEDGMENTS**

**DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS AUGUST 16, 2005 PUBLIC MEETING:**

- A. Benjamin Vialpando v. Department of Transportation, State Personnel Board case number 2005G002.

The Board reviewed and considered Complainant's Request for Oral Argument and voted to deny Complainant's Oral Argument. The Board voted to adopt the Preliminary Recommendation and deny the Petition for Hearing.

- B. Freddie Montoya v. Colorado State University at Pueblo, State Personnel Board case number 2005B059.

The Board reviewed and considered Complainant's Request for Oral Argument and voted to deny Complainant's request.

- C. Betty Pinkerton v. Department of Transportation, State Personnel Board case number 2003B115.

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge. The Board voted to adopt the Initial Decision of the Administrative Law Judge and made the Initial Decision an Order of the Board. Respondent's Request that the Board Dismiss Complainant's appeal and Affirm the Initial Decision of the Administrative Law Judge is rendered moot by the adoption of the Initial Decision of the Administrative Law Judge.

- D. Randy Pfaff v. Department of Corrections, State Personnel Board case number 2004B112(C).

The Board voted to adopt the findings of fact and conclusion of law No. 1 ("The corrective action was not arbitrary, capricious or contrary to rule or law") in the Initial Decision of the Administrative Law Judge and to reverse conclusions of law Nos. 2 ("Complainant did not commit the acts upon which discipline was based"), 3 ("Respondent's demotion of Complainant was arbitrary and capricious and contrary to rule or law"), and 4 ("Complainant is entitled to an award of attorney fees and costs incurred in appealing the demotion").

## **VIII. REPORT OF THE STATE PERSONNEL DIRECTOR**

There was no report from the Director of the Department of Personnel and Administration (DPA). Mr. Eid reiterated that he anxiously awaits a report from the Personnel Director. Mr. Zakhem stated that Mr. Wells has a conflict with the time of the Board meeting each month.

## **IX. ADMINISTRATIVE MATTERS & COMMENTS**

### **A. ADMINISTRATIVE MATTERS**

- Cases on Appeal to the Board and to Appellate Courts

Director Rozansky stated that a column would be added to the appeal charts to reflect the date the Board rendered its decision on each case.

B. OTHER BOARD BUSINESS

- Staff Activities

(1) Director Rozansky reported in the past month work had been done to develop information on grievance processes and procedures to post on the Board's website with a link to various departments' grievance procedures.

(2) As requested by the Board, DPA's Division of Human Resources (DHR) is conducting an investigation into the Department of Corrections' (DOC) layoff process, which Board staff is not directing, but staff is providing access to files to be examined. Mr. Zakhem remarked that Mr. Wells has indicated that the investigation will be comprehensive and DOC's layoff matrix is being examined for compliance with constitution, statute, and rules.

(3) Director Rozansky stated that the Legislative Audit Committee is holding hearings regarding the elimination of investigations by DPA into whistleblower charges and has drafted legislation to effect this portion of the 2005 Audit of the Board and DPA.

(4) Board staff is conducting a Continuing Legal Education (CLE) seminar on December 16, 2005, at Holland & Hart, a law firm which is supplying a meeting room, meals, and copying and taping services. It is anticipated that there will be CLE credits and the cost is projected to be under \$50.00. Administrative Law Judge Mary McClatchey is spearheading this effort.

(5) There is a working group from the Colorado Civil Rights Division (CCRD) regarding the investigative function of CCRD. Director Rozansky, a member of the working group, remarked that the Board staff cannot do both investigations and perform the adjudicatory function for discrimination allegations.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

Mike Fowler of BVCC asked about a rumor regarding overtime calculations for 40-hour per week employees. He had heard that overtime

would be based on 8-hour days, rather than 40-hour weeks. Ms. Salkind replied that this was a DPA issue involving the Fair Labor Standards Act and federal procedure, not within the Board's purview. Director Rozansky told Mr. Fowler she would put him in contact with DPA's DHR so that he could be provided with information regarding his inquiry.

Following Warden Tony Carochi's expression of appreciation for the Board coming to BVCC, Mr. Zakhem expressed his gratitude to Warden Carochi and his staff for their hospitality in hosting the September meeting and for expressing interest in the Board. He explained why the Board does outreach, its desire to "remove the mystique" surrounding how the Board operates, and the roles of the Board in adjudication of cases and rulemaking.

## **X. PROPOSED LEGISLATION AND/OR RULEMAKING**

Mr. Eid commented that the public may want copies of the Report of the State Auditor - Department of Personnel & Administration and the State Personnel Board Performance Audit dated June 2005 and that the Audit contained some interesting information, such as the median age of a state employee is 47 and 70% of the workforce will retire in 10 years so succession planning and hiring practices are extremely important. Director Rozansky explained that the Audit of DPA and the Board was done together because the Board is "housed" within DPA, who handles administration of the system. She also mentioned the two recommendations from the Auditors regarding the elimination of the whistleblower investigations and the development of the mediation process by DPA.

With regard to rulemaking, the Director stated that the September 8, 2005 memorandum to Senator Joan Fitz-Gerald from herself re State Personnel Board's 2005 Rulemaking was generated for the purpose of clearing up a misunderstanding that the Board had a role in approving the Director's Procedures which became effective July 1, 2005. There are four areas, all of which are Director's Procedures, which are being contested by the Colorado Federation of Public Employees and other employee groups: (1) multiple vacancies; (2) temporary appointments; (3) examinations; and (4) contracting out.

## **XI. EXECUTIVE SESSION**

- A. Case Status Report
- B. Minutes of the August 16, 2005 Executive Session

The meeting adjourned by consensus.

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**APPROVED THIS 18th DAY OF OCTOBER, 2005.**

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John Zakhem, Chair

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Troy Eid, Member

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Diedra Garcia, Member

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Donald J. Mares, Member

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Elizabeth Salkind, Member